

and must “extend program-access rules to terrestrially-delivered programming”⁴⁴ whenever a cable operator has acted in a way that has such a purpose or effect.

Moreover, as a matter of policy, counteracting the evasion of program access requirements is entirely consistent with congressional intent in enacting Section 628 and in granting the Commission enforcement power. Section 628 is designed “to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite programming field, that inhibit the development of multichannel video distribution competition.”⁴⁵ And the Commission has always acknowledged that Section 628(b) “is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming.”⁴⁶

In fact, the Commission has monitored the terrestrial evasion controversy in recent years, and has vowed to step in when, as now, evidence of the problem is brought before it. In the 1994 Video Competition Report, for example, the Commission pledged to monitor cable industry conduct involving programming that is not delivered via satellite.⁴⁷ In the 1995

⁴⁴ *Id.*

⁴⁵ *Program Access Order*, 8 FCC Rcd. at 3374, ¶ 41.

⁴⁶ *Id.* (emphasis supplied); see *OVS Third Report and Order*, 11 FCC Rcd. 20227, 20300, ¶ 169; *OVS Second Report and Order*, 11 FCC Rcd. 18223, 18320, ¶ 186.

⁴⁷ *1994 Competition Report*, 9 FCC Rcd. 7442, 7531, ¶ 181-182 (responding to Liberty Cable’s prediction that “unless corrected, the problem [of evasion of program access protections through terrestrial distribution] will grow in the future because vertically integrated programming vendors will have the incentive to modify the distribution of their programming, using fiber

Video Competition Report, the Commission again acknowledged terrestrial evasion concerns, but confronted “no specific evidence regarding anticompetitive behavior that would require further action at this time.”⁴⁸ In 1996, in response to arguments that “delivery of programming by terrestrial means instead of via satellite may permit cable operators to abuse vertical relationships between themselves and programmers,” the Commission explained that when presented with evidence of such conduct, it would at that time “consider an appropriate response to ensure continued access to programming.”⁴⁹ Now that the problem has clearly materialized in Philadelphia, the Commission has a perfect opportunity to develop that response.

That Congress intended Section 628(b) to address anticompetitive conduct not specifically identified, or even anticipated, at the time of its enactment is further evidenced by Congress’s specification of only the “minimum” content of program access regulations.⁵⁰ The Commission in fact has noted that Congress “did not limit the Commission to adopting rules only as set forth in that statutory provision,” but instead granted the Commission broad authority, and expected the Commission, to adopt additional rules or to take additional action “that will advance the purposes of Section 628.”⁵¹ The Commission plainly has the authority to address

optics or other non-satellite means, in order to evade application of the program access requirements.”).

⁴⁸ *1995 Video Competition Report* at ¶ 168.

⁴⁹ *1996 Video Competition Report* at ¶ 153, 154.

⁵⁰ *See* 47 U.S.C. § 548(c).

⁵¹ *OVS Third Report and Order*, 11 FCC Rcd. at 20300, ¶ 169; *see* 1992 Cable Act Conference Report, H.R. Rep. 102-862 at 93 (“In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory rates to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies by providing facilities-based competition to cable and extending programming to areas not served by cable.”).

whether evasion contravenes the statutory proscription.⁵² Indeed, failure of the Commission to counteract evasion would constitute an abdication of its authority to adopt additional rules or interpretive approaches “should additional types of conduct emerge as barriers to competition.”⁵³ It would also undermine the intent of Congress in enacting the program access law, directly injure consumers, and inhibit the development of competition in the MVPD marketplace.

IV. CONCLUSION

When Congress enacted program access provisions for the express purpose of bringing competition to the multichannel video marketplace, legislators expected the Commission’s implementing rules to do just that. Now, more than five years later, the vast majority of the American public still has no equivalent alternative to incumbent cable operators in most local MVPD markets, and is therefore pressured to accept the rates and service options dictated by the cable industry.

The Commission could take a major step towards increasing competition by curing the shortcomings in its current implementation of Section 628. It should adopt the revisions to the program access complaint process described herein, *i.e.*, (1) establish a reasonable but firm deadline for the resolution of all program access complaints; (2) permit a limited but automatic discovery right for program access plaintiffs; and (3) award damages in appropriate cases for violation of the program access rules.


⁵² See also 47 U.S.C. § 4(i) (FCC “may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions”); 47 U.S.C. § 303(r) (granting FCC authority to “[m]ake such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of” the Communications Act).

⁵³ *Program Access Order*, 8 FCC Rcd at 3374, ¶ 41.

The Commission should also take all further administrative action necessary to ensure the fair and equal access to programming that Congress prescribed, including the monitoring and policing of incumbent cable efforts to evade program access rules through terrestrial distribution. Aggressive Commission enforcement is a necessary precondition to the attainment of MVPD competition. The Commission should take every opportunity, and marshal all of its power, to achieve this result.

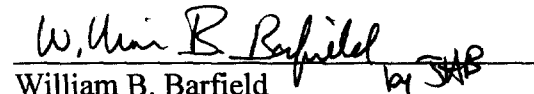
Respectfully submitted,

BellSouth Corporation
BellSouth Interactive Media Services, Inc.
BellSouth Wireless Cable, Inc.



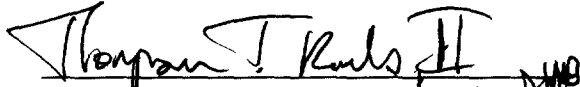
Gary M. Epstein
James H. Barker
Johanna E. Mikes*
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200

BellSouth Corporation



William B. Barfield
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 249-2641

BellSouth Interactive Media Services, Inc.
BellSouth Wireless Cable, Inc.



Thompson T. Rawls, II
Gali L. Hagel
1100 Abernathy Road
500 Northpark Town Center
Suite 414
Atlanta, GA 30328
(770) 673-2857

Their Attorneys

* Admitted in Massachusetts only.

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